

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB AUG. 25, 99
U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

F.D.C. Wholesale Corp.
v.
La Cibeles, Inc.

Opposition No. 104,891 to application Serial No. 74/720,260
filed on August 25, 1995

Mary L. Kevlin and Denise Bricker of Cowan, Liebowitz & Latman,
P.C., for F.D.C. Wholesale Corp.

Bernard Malina of Malina & Wolson for La Cibeles, Inc.

Before Simms, Hohein and Bottorff, Administrative Trademark
Judges.

Opinion by Hohein, Administrative Trademark Judge:

An application has been filed by La Cibeles, Inc. to
register the mark "LOVE MY BABY" and design, as reproduced below,

for "body soaps, perfume, toilet water, cologne, talcum powder, creme body lotions, liquid body soap, bar hand soap, perfume splashes, eau-de-toilette, and dusting powder."¹

Registration has been opposed by F.D.C. Wholesale Corp. on the ground that opposer "is and for many years has been in the business of manufacturing and distributing various personal care products"; that "[a]t least as early as June, 1985, opposer began using the trademark, LOVE YOUR BABY, on and in connection with the manufacture and distribution of baby oil, baby shampoo, baby wipes, petroleum jelly with baby fragrance, and baby powder"; that opposer "subsequently expanded its use of its LOVE YOUR BABY mark to skin lotions and baby nail clips"; that opposer is the owner of valid and subsisting registrations of the mark "LOVE YOUR BABY" for the following goods: (a) "skin lotion";² (b) "baby oil, baby shampoo, baby wipes, petroleum jelly with baby fragrance and baby powder";³ and (c) "baby nail clips";⁴ that "[u]pon information and belief, applicant has made no use of its mark," but that such mark "will be used on products which are very similar to the products on which opposer uses its LOVE YOUR

¹ Ser. No. 74/720,260, filed on August 25, 1995, which alleges a bona fide intention to use the mark in commerce.

² Reg. No. 1,393,713, issued on May 20, 1986, which sets forth dates of first use of July 19, 1985; combined affidavit §§8 and 15. The word "BABY" is disclaimed.

³ Reg. No. 1,567,811, issued on November 28, 1989, which sets forth dates of first use for such goods of June 1985. The word "BABY" is disclaimed. The registration also lists "disposable diapers" and sets forth dates of first use of the mark in connection therewith of January 1, 1986.

⁴ Reg. No. 2,007,421, issued on October 15, 1996, which sets forth dates of first use of January 1992. The word "BABY" is disclaimed.

BABY mark"; and that applicant's mark, when used in connection with applicant's products, so resembles opposer's mark for its goods as to be likely to cause confusion, mistake or deception.

Applicant, in its answer, has denied the salient allegations of the opposition.

The record includes the pleadings; the file of the opposed application; and, as opposer's case-in-chief, notices of reliance upon (i) certified copies of its pleaded registrations, which show in each instance that the registrations are subsisting and owned by opposer, and (ii) applicant's responses to certain of opposer's interrogatories, which essentially confirm that applicant has yet to use its "LOVE MY BABY" and design mark. Applicant, as its case-in-chief, has submitted a notice of reliance upon plain copies of third-party registrations for marks which, in each case, consist of or contain the words "LOVE" and "BABY" or variations thereof.⁵ Neither party, however, took testimony. Briefs have been filed, but an oral hearing was not requested.

Opposer's priority of use of its "LOVE YOUR BABY" mark is not in issue since, as previously noted, the certified copies of the registrations therefor demonstrate that the registrations are subsisting and owned by opposer. See King Candy Co. v.

⁵ Although applicant's notice of reliance lists ten third-party registrations, copies of only nine of those registrations were attached. Nevertheless, since opposer, in its initial brief, has treated the "missing" registration for the mark "BABY LUV" for "infant's and toddler's clothing--namely pajamas, cover-alls, creepers, polo shirts and underwear" as forming part of the record, the registration is deemed to have been stipulated into the record and has accordingly been given consideration.

Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974). The only issue to be determined, therefore, is whether applicant's "LOVE MY BABY" and design mark, when used in connection with body soaps, perfume, toilet water, cologne, talcum powder, creme body lotions, liquid body soap, bar hand soap, perfume splashes, eau-de-toilette, and/or dusting powder, so resembles opposer's "LOVE YOUR BABY" mark for its various baby care products and/or skin lotion that confusion is likely as to the origin or affiliation of the parties' goods.

Notwithstanding the limited record in this case, we are constrained to agree with opposer that, upon consideration of the pertinent factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973), for determining whether a likelihood of confusion exists, confusion as to the source or sponsorship of the parties' products is likely. In this regard, we note that, on their face, the respective goods are either virtually identical in part, such as opposer's baby powder and applicant's talcum powder and dusting powder, or are otherwise closely related toiletries and other personal-care products for babies and/or adults. The parties' goods are of such a nature that they obviously would be marketed through the same channels of trade, including drug stores, supermarkets, mass merchandisers and department stores, and would be sold to the same classes of purchasers, including ordinary consumers. Furthermore, by their very nature, such goods would for the most part be relatively inexpensive and, because they

would typically need to be frequently replaced, would not be purchased with a great deal of care or discrimination.

Applicant, as opposer points out in its reply brief, "does not deny that the parties' goods are [virtually] identical or closely related goods which must be presumed to travel in the same channels of trade to the same classes of unsophisticated customers". In fact, applicant's brief contains no discussion at all regarding any similarities or dissimilarities between the parties' goods, their channels of distribution, or the conditions under which and buyers to whom sales are made. It is clear, however, that if applicant's and opposer's goods were to be sold under the same or substantially similar marks, confusion as to the origin or affiliation thereof would be likely to occur.

Applicant, in this case, focuses its arguments instead on its contentions that the respective marks overall are so dissimilar that there is no likelihood of confusion. Specifically, applicant urges that its mark "is distinctive, particularly in view of the design portion, [while] Opposer's mark is weak as highlighted by the disclaimer of the ... word BABY"; that, in light of the latter, "all that is left ... in Opposer's mark are the words LOVE YOUR"; that, as shown by the ten third-party registrations which were made of record, "it is wholly unsurprising that LOVE is commonly paired with BABY in composite marks for baby products," given the suggestiveness inherent in the word "love"; and that the "remaining terms YOUR and MY [in the respective marks] hardly convey similar meaning" and, "indeed, they are opposites!" Applicant consequently

maintains that, even "aside from the presence of the distinctive and, therefore, dominant design portion of Applicant's mark, the word portions of the respective marks convey different meanings," thereby precluding any likelihood of confusion.

While applicant is correct that the respective marks must be considered in their entirety, we agree with opposer that, when the parties' marks are so considered, confusion would be likely. Opposer's "LOVE YOUR BABY" mark and the literal portion of applicant's mark, consisting of the words "LOVE MY BABY," are substantially similar in their overall sound, appearance and connotation, and engender essentially the same commercial impression. Both marks consist of or contain a three-word phrase which starts with the word "LOVE," ends with the word "BABY" and has a personal pronoun, "YOUR" or "MY," in the middle. While, in the abstract, such pronouns may be considered opposites in meaning, in the context of the respective marks, we concur with opposer that "[i]t is the purchaser's 'baby' (whether literally or figuratively) that is being referred to" in each instance. The phrase "LOVE MY BABY" in applicant's mark is thus substantially similar to opposer's "LOVE YOUR BABY" mark in connotation and, in light of their substantial phonetic and visual similarities, the respective marks project essentially the same overall commercial impression.

Moreover, as opposer further notes, while applicant's mark, unlike opposer's mark, "contains a design element -- a drawing of five bare-bottomed infants and toddlers holding and releasing balloons -- [such feature] does not help to

differentiate the ... parties' marks." Although a design feature of a mark cannot be ignored, it is nevertheless the case that, as a general proposition, where a composite mark contains both word and design elements, it is the wording which is usually the dominant portion thereof because it would be used by consumers in looking for or requesting the goods by a particular brand name. See, e.g., In re Appetito Provisions Co., 3 USPQ2d 1553, 1554 (TTAB 1987); Kabushiki Kaisha Hattori Tokeiten v. Scuto, 228 USPQ 461, 462 (TTAB 1985); and In re Morrison Industries, Inc., 178 USPQ 432, 433 (TTAB 1973). Here, as opposer observes, "the design portion of Applicant's mark[,], which features babies [and toddlers,] does not alter the commercial impression of Applicant's LOVE MY BABY mark, and indeed reinforces the impression of the mark as presenting a product appropriate for babies or those who wish to be babied."

Finally, with respect to applicant's contention that the third-party registrations which it introduced as the sole evidence in its behalf mandate a finding that opposer's "LOVE YOU BABY" mark is weak and accordingly is entitled to only a narrow scope of protection, we note that such registrations do not establish that the marks which are the subjects thereof are in actual use and that the purchasing public is consequently familiar with them. See, e.g., Smith Brothers Manufacturing Co. v. Stone Manufacturing Co., 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973) ["in the absence of any evidence showing the extent of use of any of such marks or whether any of them are now in use, they provide no basis for saying that the marks so

registered have had, or may have, any effect at all on the public mind so as to have a bearing on likelihood of confusion."] As stated in *AMF Incorporated v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973):

[L]ittle weight is to be given such registrations in evaluating whether there is likelihood of confusion. The existence of these registration is not evidence of what happens in the market place or that customers are familiar with them nor should the existence on the register of confusingly similar marks aid an applicant to register another likely to cause confusion, mistake or to deceive.

Furthermore, although the third-party registrations of record may, at best, serve as indications that, as applied to certain goods or services, the word "LOVE" is suggestive while the term "BABY" is descriptive, so that the differences in other portions of marks containing those words may be sufficient to render the marks as a whole distinguishable (see, e.g., *Tektronix, Inc. v. Daktronics, Inc.*, 187 USPQ 588, 592 (TTAB 1975), *aff'd*, 534 F.2d 915, 189 USPQ 693, 694-95 (CCPA 1976)), it is nevertheless the case that, with the possible exception of the mark "LOVE ME BABY," none of the third-party registrations is as similar to opposer's mark as such mark is to applicant's mark. The "LOVE ME BABY" mark, however, like each of the marks "LOVABLE BABIES," "LOVE-A-BYE BABY" and design, and "BABY LUV," is by contrast registered for such wholly unrelated goods as "dolls," while the marks "BABY LOVE" and "BABY LUV" are respectively registered for such distinctly different services and goods as "retail store services featuring infant and child clothing,

furniture, accessories and toys" and "infant's and toddler's clothing--namely pajamas, cover-alls, creepers, polo shirts and underwear". None of such marks is for the type of closely related toiletries or personal care products that are involved in this proceeding.

With respect to the four other third-party registrations, the two for the mark "LOVE'S BABY SOFT," which were issued to different entities, cover "cologne spray, light cologne splash, body mist, cologne mist, skin moisturizing lotion, body wash, body powder, personal deodorant, perfume, all over body spray, and gift sets" and "perfume; cologne; hair shampoo and creme rinse; bubble bath; body lotion; body talcum powder; and facial cleanser," while the two for the mark "BABY LOVE," which also issued to different registrants, are for "hair shampoo products; namely, shampoos, conditioners, fixatives and hair dressings" and "medicated skin preparation for diaper rash". Although such goods, like those involved in this proceeding, are all basically toiletries and other personal-care products for babies and/or adults, none of these third-party marks is as similarly structured as are applicant's and opposer's marks. As opposer persuasively points out in its initial brief:

None of the third party [sic] registrations use the word "LOVE" as a verb; none end with the word "BABY"; and none contain a pronoun in a phrase between the words "LOVE" and "BABY."

We therefore concur with opposer that not one of the ten third-party registrations is relevant to or otherwise has a bearing upon the determination of the issue of likelihood of confusion.

In consequence of the above, we conclude that customers and prospective purchasers, familiar with opposer's "LOVE YOUR BABY" mark for its various baby care products and/or skin lotion, would be likely to believe, upon encountering applicant's substantially similar "LOVE MY BABY" and design mark for body soaps, perfume, toilet water, cologne, talcum powder, creme body lotions, liquid body soap, bar hand soap, perfume splashes, eau-de-toilette and dusting powder, that such closely related toiletry and personal care products emanate from, or are otherwise sponsored by or affiliated with, the same source.

Decision: The opposition is sustained and registration to applicant is refused.

R. L. Simms

G. D. Hohein

C. M. Bottorff
Administrative Trademark Judges,
Trademark Trial and Appeal Board